

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re: :  
: Case No. 20-22614  
EDISON PRICE LIGHTING, INC. : White Plains, New York  
: July 10, 2020  
Debtor. :  
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Transcript - Case No. 20-22614  
Before the Honorable Robert Drain  
United States Bankruptcy Judge

Application to Employ Beechwood Capital Advisors, LLC and  
HunterPoint, LLC as Advisors filed by H. Bruce Bronson, Jr. on  
behalf of Edison Price Lighting, Inc. with presentment to be  
held on 6/26/2020 (ECF #59)

Affidavit/Supplemental Declaration of Peter A. Furman in  
support of Application to Employ Beechwood Capital Advisors,  
LLC and HunterPoint, LLC as Advisors (related document(s)59)

Filed by H. Bruce Bronson, Jr. on behalf of Edison Price  
Lighting, Inc. (ECF #70)

Affidavit/Supplemental Declaration of Richard Conroy in support  
of Application to Employ Beechwood Capital Advisors, LLC and  
HunterPoint, LLC as Advisors (related document(s)59) Filed by  
H. Bruce Bronson, Jr. on behalf of Edison Price Lighting, Inc.  
(ECF #71)

Interim Hearing of Cash Collateral (If Necessary)  
Motion to Compel -- Motion of United Development Venture, LLC  
to compel payment of accrued post-petition rent pursuant to  
11 U.S.C. 365(d)(3), or in the Alternative for an Order Deeming  
its Lease Rejected and Modifying the Automatic Stay to Allow  
Movant Landlord to Pursue its State Court Remedies  
Citibank's Objection to Motion of United Development Venture,  
LLC (ECF #65)

Objection to Motion (related document(s)63) filed by H. Bruce  
Bronson, Jr. on behalf of Edison Price Lighting, Inc.

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1 THE COURT: In re: Edison Price Lighting, Inc.

2 MS. SCHWARTZ: Good morning, Your Honor. Bruce  
3 Bronson on behalf of the Debtor, Edison Price.

4 THE COURT: Good morning.

5 MR. HOOTEN: Good morning, Your Honor. Paul Hooten  
6 here on behalf of American Express.

7 THE COURT: I'm sorry. That was Paul Hooten?

8 MR. HOOTEN: Yes.

9 THE COURT: Okay. Good morning.

10 MR. YAN: Good morning, Your Honor. David Yan on  
11 behalf of United Development Venture, LLC.

12 THE COURT: Good morning, Mr. Yan.

13 MR. YAN: Thank you, Your Honor.

14 MR. CUEVAS: Good morning, Your Honor. Carlos Cuevas  
15 on behalf of Joel Siegel, Richard Shaver, and George Closs.  
16 They are executives with the company.

17 THE COURT: Okay. I think, at least on my  
18 connection, your name didn't come through clearly. If you  
19 could just state that again.

20 MR. CUEVAS: Of course, Your Honor. Carlos Cuevas on  
21 behalf of Joel Siegel, Richard Shaver, and George Closs. They  
22 are executives with the company, Your Honor.

23 THE COURT: Okay. Good morning.

24 MR. PIRRAGLIA: Good morning, Your Honor. Anthony  
25 Pirraglia and Stuart Glick from Thompson & Knight on behalf of

1 Citibank.

2 THE COURT: Okay. Good morning. All right.

3 There are a number of matters on the calendar in this  
4 case this morning. The first two involve professional  
5 retention and application that was made on notice of  
6 presentment. I haven't seen any objections.

7 Mr. Bronson --

8 MR. BRONSON: Yes, Your Honor. I've worked with  
9 Andrea Schwartz on this, you know, over the last couple of  
10 weeks. She has no -- the UST has no objection to hiring the  
11 professionals. They had an objection to the way I wanted to  
12 pay them, so we've basically agreed that the payment will just  
13 be as usual where we'll just file a fee application and get  
14 them paid. The idea here was that these are -- these people  
15 are putting in a lot of time and should be paid on an ongoing  
16 basis, but at this point, I can do a quick fee application for  
17 them that could be heard on our next date, which is August  
18 14<sup>th</sup>, and I think that would take care of this issue, Your  
19 Honor.

20 THE COURT: Okay. That's fine. I had a similar  
21 point here, particularly given, well, as far as Beechwood was  
22 concerned, it really should be just a regular 330 application  
23 process.

24 As far as HunterPoint is concerned, I gather that at  
25 least one person from there is on-site or effectively on-site

1 but is not stepping into any role like CFO or crisis manager  
2 but is simply a professional providing similar services;  
3 correct?

4 MR. BRONSON: That's correct, Your Honor.

5 THE COURT: Okay.

6 MR. BRONSON: Mr. Furman is basically providing a CRO  
7 function, but he's not the CRO.

8 THE COURT: All right. So in light of that, I think  
9 Miss Schwartz was right in saying that this should be dealt  
10 with by a regular fee application process, and in light of that  
11 and there being no other objection, and based on my review of  
12 the motions, which I just happened to do since it was on  
13 calendar today, I'll be granting the application. There should  
14 be two separate orders, one for Beechwood and one for  
15 HunterPoint, and it should reflect the agreement that you've  
16 just laid out on their being compensated under \$ 330 with  
17 regular application.

18 MR. BRONSON: Yes, Your Honor.

19 THE COURT: Okay. Now, we are also here on the  
20 continued hearing on use of cash collateral. I saw your email  
21 to chambers from the other day saying that you were working on  
22 an extension of the interim order. I don't think I saw the  
23 actual interim order as extended. Has it been agreed at this  
24 point?

25 MR. BRONSON: Yes, it has, Your Honor, and I did send

1 it to chambers and to your clerk, and I docketed it yesterday  
2 as well.

3 THE COURT: Okay. Well --

4 MR. BRONSON: What we laid out in a budget goes  
5 through October 9<sup>th</sup>, but we're basically agreeing to the budget  
6 through August 14<sup>th</sup>.

7 THE COURT: Okay. So I'll turn to the budget in a  
8 second, but as far as the order is concerned, is it basically  
9 the same as the last order, which I think was the third one,  
10 except this will be a fourth one?

11 MR. BRONSON: Exactly, Your Honor. There's no major  
12 changes, just minor changes.

13 THE COURT: Okay. And so as far as the budget is  
14 concerned, other than increased expenses based on the Debtor's  
15 now having greater access to its facility, are there any other  
16 changes to the budget?

17 MR. BRONSON: No, Your Honor. We have rent being  
18 paid monthly starting this month, which the check was delivered  
19 yesterday, I believe, at the rate of \$114,000, and we have  
20 Citibank getting an adequate assurance payment of \$17,000,  
21 approximately \$17,000, which was in the third interim budget,  
22 also for a July payment.

23 THE COURT: With the provision in the order saying  
24 that that will be applied consistently with § 506 of the Code.

25 MR. BRONSON: Well, it says it's going to be applied

1 to principal.

2 THE COURT: Okay. Well, that's even better to its  
3 allowed claim and to the principal. So I don't know if anyone,  
4 unlike me, has had a chance to review the proposed order and  
5 budget or is just prepared to go based on the representations  
6 on the record today to -- if they wanted anything more to say  
7 on the cash collateral.

8 MR. YAN: Your Honor, for the post-amendment order  
9 cash (inaudible), I have an RCNA budget for the payment of the  
10 rent, post-petition rent, for May and June as well as the  
11 property tax and insurance. The landlord has to pay the  
12 mortgage to the (inaudible). They have to collect the monthly  
13 mortgage payments, property tax, and insurance and (inaudible)  
14 has not been able to pay almost for three months. I believe  
15 the bank has already issued a warning letter. If the landlord  
16 still fails to pay the monthly mortgage, including the property  
17 tax and insurance, then the bank will probably start some  
18 proceedings to enforce the payments.

19 I think the budget should include that the monthly  
20 rent payments for rent, additional rent for May and June, that  
21 the Debtor's counsel, Bruce Bronson, told us that they ordered  
22 an express that the rent payment for July 2020 but does not  
23 want to pay any property tax and insurance. That's really  
24 prejudices the landlord.

25 THE COURT: All right. Well, we will get to the

1 landlord's motion to compel payment for the two months that are  
2 not being covered in a moment.

3 But related to that and to the budget, Mr. Bronson,  
4 what do the projections show, and I'm assuming given the work  
5 that you and your client have done with the lender, Citibank,  
6 there was a fair amount of due diligence on the projections.  
7 What do they show after payment of the budget item as there  
8 being any surplus to the Debtor?

9 MR. BRONSON: There is not much in the way of  
10 surplus. There is some. It goes down on August 14<sup>th</sup>. It  
11 actually dips to about I think its lowest amount of about  
12 \$45,000, and --

13 THE COURT: Just so you know, I have pulled it up. I  
14 do see your email from yesterday.

15 MR. BRONSON: Okay.

16 THE COURT: So I'm looking --

17 MR. BRONSON: What's really positive here is that the  
18 accounts receivable billed quickly and billed pretty well. The  
19 problem is there's always a 45- to 60-day timing between  
20 shipping and getting paid. The normal terms are 30 days, so 45  
21 to 60 days is what we're using. So the business is coming back  
22 online, and it's getting new orders every week from about  
23 \$80,000 to \$100,000 of new orders, and it has this backlog and  
24 it has a good amount of released work, which is stuff that can  
25 actually be completed and shipped and paid for, but it takes



1 time to bring it back fully to where there's good cash flow  
2 coming in.

3 THE COURT: All right. When is the next tax payment  
4 due in respect to the lease?

5 MR. YAN: Tax payment, I believe that's by every half  
6 year. The property was, I believe, July 1<sup>st</sup> for the next six  
7 months of the property tax. For the first quarter, I mean  
8 first quarter and second quarter of 2020 to 2021 and past  
9 property tax already owed, I believe they tried to borrow some  
10 money, find somewhere else to pay the past tax due for 2019 to  
11 2020, the fourth quarter of the property tax, and that's in the  
12 motion. I believe that the property tax every month is about  
13 -- for May and June, it's \$20,791.55, and for July and ongoing  
14 every month, it's about \$21,964.90 a month. Translated to  
15 quarterly, it's about \$65,000.00 a quarter for the property  
16 tax.

17 THE COURT: So when is the property tax actually  
18 owed? Not by the Debtor but to the taxing authority?

19 MR. YAN: I don't know. I need to find out from the  
20 landlord. They provided me the information about property tax  
21 owed for post-petition from May, June, and July is \$63,548.00.

22 THE COURT: Well, I don't, I mean, I'm not that  
23 familiar with the taxing period for this particular location,  
24 but I don't believe they're being billed monthly by the taxing  
25 authority.

1 MR. YAN: You are right. You're correct. It's  
2 billed quarterly, Your Honor.

3 THE COURT: Okay.

4 MR. YAN: But based on the lease, the landlord has to  
5 bill -- I mean, the practice, when they receive a bill from  
6 their taxing authority up in New York City, then they would  
7 prepare a billing to the tenant for the tax due but broken down  
8 monthly. The landlord pays quarterly to the New York City  
9 Department of Finance and Taxation.

10 THE COURT: So, Mr. Bronson and Mr. Yan, either of  
11 you can answer this question, in reviewing the Debtor's  
12 objection to the landlord's motion to compel payment, I noted  
13 that the Debtor objected to any liability under the lease  
14 beyond the stated monthly rent of \$114,000. Pre-petition, did  
15 the Debtor pay in addition to that amount additional rent in  
16 the form of taxes?

17 MR. YAN: Yes, Your Honor. Before the petition, the  
18 additional rent owed by the tenant, the Debtor in possession,  
19 before October 2019, they paid the rent and additional rent  
20 including the property tax and insurance. They never disputed  
21 these amounts because these amounts, that's mandated by the  
22 lease. The tenant has to pay the property tax and insurance,  
23 and since October 2019, the tenant failed to pay the rent, but  
24 the tenant cut three checks to pay the October 2019 rent but  
25 with insufficient funds. That's the fraudulent debt obtained

1 by the tenant, and since October 2019 to now, tenant has not  
2 paid, maybe they paid the July 2020 rent, but the tenant has  
3 not paid since October 2019 up to now rent, additional rent,  
4 covering the property tax and insurance. But before that, they  
5 paid.

6 THE COURT: So, Mr. Bronson, what is the argument  
7 that the Debtor is not liable to pay the property taxes and  
8 insurance?

9 MR. BRONSON: Your Honor, as far as the property tax,  
10 I don't believe we said that the Debtor is not liable to pay  
11 it. I believe we said that the terms under the lease require  
12 presenting that tax bill and actually billing us for it, which  
13 had not been done.

14 THE COURT: All right.

15 MR. BRONSON: And the insurance is different, Your  
16 Honor. The insurance has always been disputed because there's  
17 double insurance on this building. The Debtor is carrying  
18 insurance and is required to carry insurance, and then the  
19 lease has a provision that the Debtor will reimburse the  
20 landlord for insurance, and it's double insurance and it, you  
21 know, it's not proper.

22 THE COURT: Well, is the building insured?

23 MR. BRONSON: Yes, Your Honor.

24 THE COURT: Does the Debtor has a policy naming the  
25 landlord as a (inaudible)?

1 MR. BRONSON: Yes, it does, Your Honor.

2 THE COURT: Okay. All right. So when did the Debtor  
3 resume operations at the building?

4 MR. BRONSON: I believe June '19.

5 THE COURT: Okay. And was it limited in doing so, or  
6 did the operations actually resume then?

7 MR. BRONSON: Operations resumed on a small scale.  
8 The plant needed to be cleaned. People are being brought back  
9 gradually, and I don't think everybody will be brought back,  
10 but it's building as manufacturing is lined up for various  
11 projects.

12 THE COURT: Okay. So it does seem to me, the way the  
13 lease reads, that there needs to be an amount of taxes actually  
14 shown to the Debtor before they're owing under the lease. On  
15 the other hand, I think the cash collateral budget should  
16 include an item for payment of taxes, a projected item, and  
17 based on what I've heard and looking at the budget, although  
18 it's very small print, it looks like the Debtor would be able  
19 to do that. However, it may fall within the \$114,000 that you  
20 already have allocated there. If it turns out that the Debtor  
21 cannot make both payments, the tax payment should come ahead of  
22 the rent payment, and we'll get to that when we turn to the  
23 motion to compel payment of the rent from the petition date  
24 through I guess the July payment and ongoing and why I reached  
25 that conclusion.

1 But as far as adequate protection of the landlord's  
2 interest, the tax does need to be paid, although it should be  
3 paid only as per a proper notice as to what's owing as opposed  
4 to some sort of monthly estimation for the post-petition  
5 period.

6 MR. CUEVAS: Your Honor, this is Carlos Cuevas. I  
7 checked on the New York City Department of Finance website, and  
8 if the property's assessed value is greater than \$250,000, then  
9 there are two tax payment dates during the year, July 1<sup>st</sup> and  
10 January 1<sup>st</sup>.

11 THE COURT: Right.

12 MR. CUEVAS: It's not billed on a monthly basis, Your  
13 Honor.

14 THE COURT: No. I didn't think it would be, but in  
15 any event, July 1<sup>st</sup> has already happened, so before it becomes  
16 -- before it starts to give rise to either a lien or penalties,  
17 there should be a provision for the payment of the taxes.

18 As I noted, if it turns out that the Debtor doesn't  
19 have the money to make that payment and the monthly rent  
20 payment, the monthly rent payment should be reduced to enable  
21 the taxes to be paid.

22 MR. CUEVAS: Understandable.

23 THE COURT: So that may give you a preview into how  
24 I'm doing the landlord's motion to compel payment, which we'll  
25 turn to now under § 365(d)(3).

1           You should assume, both of you, and I know that  
2 Citibank has also filed an objection to this motion, that I've  
3 reviewed the pleadings on it and, frankly, I think the  
4 discussion that we just had has answered my questions about it.  
5 So my inclination is to give you my preliminary ruling on it  
6 and then give you a chance to address that ruling before I make  
7 it final and persuade me that some portion of it should be  
8 changed.

9           § 365(d)(3) requires, at least states -- I'd ask  
10 everyone to put themselves on mute unless they're going to be  
11 speaking so there's no talking over what I'm saying and the  
12 people in the case can actually hear my preliminary ruling and  
13 focus on it.

14           § 365(d)(3) --

15           Look. I'm only going to say this one more time, and  
16 we will drop you from the call if you don't do what I tell you  
17 to do. Put your phone on mute. All right.

18           § 365(d)(3) states that the Trustee shall timely  
19 perform all the obligations of the Debtor, except those  
20 specified in § 365(b)(2) which doesn't apply here, arising from  
21 and after the order for relief under any unexpired lease of  
22 non-residential real property until such lease is assumed or  
23 rejected, notwithstanding § 503(b)(1) of this title.

24           The Code's reference and Trustee here also include  
25 the Debtor in Possession, which would include this Debtor in

1 Possession, and the phrase notwithstanding § 503(b)(1) of this  
2 title takes out of consideration with respect to the  
3 obligations of the Debtor under a lease of non-residential real  
4 property. The general case law, as set forth in McFarland v.  
5 Bethlehem Steel and numerous other cases, that an  
6 administrative expense is allowed only to the extent of the  
7 benefit to the Debtor's estate, i.e. here the contract governs.

8           The Court may extend the time to perform for 60 days  
9 after the petition date but no longer. Based on that section,  
10 and given that it has not been paid any rent under the lease  
11 for -- any additional rent under the lease for the period from  
12 the petition date at least until July, the landlord has moved  
13 to compel payment via Debtor and the secured creditor,  
14 Citibank, which has a lien on the Debtor's cash, have objected  
15 to this motion on two primary grounds, the first being that  
16 § 365(d)(3), notwithstanding it says the Debtor shall timely  
17 pay, does not have a specific remedy attached to it, and under  
18 applicable case law, including cases in this district but  
19 elsewhere as well, the ultimate remedy for nonpayment is an  
20 administrative expense claim in the amount of the obligations  
21 due under the lease.

22           That is especially the case where it appears that the  
23 Debtor may be administratively insolvent, or at the moment may  
24 have a cash flow problem that would mean that it could not make  
25 all or some portion of the payment compounded by the fact, as

1 is often the case and in this case here, that the Debtor's cash  
2 is subject to a lien, in this case Citibank.

3 In addition to that argument, the objectors point out  
4 that due to the stay in place orders issued by the Governor of  
5 New York, the Debtor was not able to use the leased property  
6 for a major portion of the post-petition period, and it has  
7 been confirmed on today's record that the Debtor only began to  
8 reopen the premises for manufacturing in the third week of  
9 June.

10 The effect of COVID-19-related governmental shutdowns  
11 has been dealt with by Bankruptcy Courts in various cases, two  
12 of which are cited by the objections. First, (inaudible) an  
13 order in the Modell's case in New Jersey, and secondly in in  
14 re: Pier 1, that's number 1, Imports, Inc., 2020 Bankruptcy  
15 Lexis 1242, Bankruptcy E.D. Virginia, May 10, 2020.

16 Both of those decisions involve motions by Debtors  
17 that were large retailers with many leased properties. The  
18 motions addressed by those Courts dealt with blanket requests  
19 by Debtors either to suspend proceedings in the case under  
20 § 305 of the Bankruptcy Code, which was the request in the  
21 Modell's case, or alternatively, simply to be relieved of the  
22 payment obligation under § 365(d)(3).

23 Here, there's no request to suspend proceedings and  
24 no need to since we're dealing with only one lease and one  
25 landlord. The Pier 1 Imports case, however, notes what I



1 believe is the majority and vast majority view that § 365(d)(3)  
2 does not have a remedy section in it, and ultimately the  
3 requirement to timely perform gives rise, if timely performance  
4 is not given, to an administrative expense and/or the right to  
5 seek relief from the automatic stay by the landlord, which is  
6 based on a different set of considerations, namely adequate  
7 protection of the landlord's interest and/or conceivably a  
8 motion to compel assumption or rejection.

9           The Pier 1 case cited the Eastern District of  
10 Virginia's own precedent in re: Circuit City Stores, Inc., 447  
11 B.R. 475, 510, Bankruptcy E.D. Virginia, 2009, for that  
12 proposition. See 2020 Bankruptcy Lexis 1242 at page 15 and 16.  
13 The Court went on to state that the landlord had a separate  
14 right -- or all landlords would have a separate right to added  
15 protection under § 361 and 363 of the Bankruptcy Code that  
16 where the Debtor was paying insurance, utilities, and taxes,  
17 the landlord was adequately protected.

18           The law in the Southern District of New York is  
19 similar to the Circuit City case going back to in re: Wedtech  
20 Corp., 72 B.R. 464, Bankruptcy SDNY 1996 at 761, which was  
21 favorably cited by the Second Circuit in re: Burger Boys, 94  
22 F3d 755, 761, Second Circuit, 1996. I think I may've given you  
23 the wrong cite on Wedtech Corp. 72 B.R. 464, Bankruptcy SDNY  
24 1987. In a similar provision, namely § 1114(e)(1) of the  
25 Bankruptcy Code, which also says that the Debtor shall timely

1 pay the obligation required thereunder. This Court at in re:  
2 Ace, A-c-e, Elevator Company, 347 B.R. 473, 489, Bankruptcy  
3 SDNY, 2006, reached the same result. The amount is fixed, but  
4 the remedy does not require immediate payment where there are  
5 legitimate concerns as to either cash flow or administrative  
6 solvency.

7 In addition, and this is an issue that was not  
8 addressed in the Modell's and Pier 1 cases, I want to raise an  
9 issue with the parties as to both the lease and the applicable  
10 state law, because again, § 365(d)(3) requires timely payment  
11 or timely performance of all obligations under the lease.

12 The Debtor was required by the stay in place orders  
13 of the Governor of New York to exit the property for at least a  
14 month and three-quarters. The lease does have a condemnation  
15 provision in paragraph 19 that's fairly broadly worded and  
16 gives the tenant a right to proration of rent for the period of  
17 condemnation.

18 Moreover, paragraph 8 laying out the remedies of the  
19 landlord, has in the introductory section a caveat, quote,  
20 unless tenant shall have heretofore made good faith efforts to  
21 cure such default as provided in this paragraph.

22 In addition, the Courts in New York have long  
23 recognized an implied covenant in contracts and leases  
24 sometimes phrased as the impossibility doctrine, or in other  
25 cases, the frustration doctrine, which relieves a party charged

1 with performance, including a tenant, where the circumstances  
2 constituting impossibility or frustration can be shown.

3 Normally, this doctrine is narrowly construed. It  
4 applies only when performance is rendered objectively  
5 impossible by an unanticipated event that could not have been  
6 foreseen or guarded against in the contract. See A-x-g-i-n-c, Corp. v. Plaza Automall, Ltd., 759 Fed. Appendix 26,  
7 29, Second Circuit, 1918; and Kel, K-e-l, Kin, K-i-n, Corp. v.  
8 Century Markets, Inc., 70 NY2d 900, 902, 1987.

10 Normally, the excuse of impossibility is limited to  
11 destruction of the means of performance by and act of God,  
12 force majeure, or by law, including governmental action. 47  
13 East 61<sup>st</sup> Garage, Inc. v. Savoy Fifth Avenue Corp., 23 NY2d  
14 275, 281, 1968.

15 Nevertheless, where a tenancy is completely precluded  
16 by governmental action, the doctrine may apply if there's no  
17 way around that problem. The 119 Fifth Avenue, Inc. v. Taiyo  
18 Trading Company, 190 Misc. 123, 125, affirms 275 AD 695, First  
19 Department, 1949. See also Gardiner Properties, Inc. v. Samuel  
20 Liedner, L-i-e-d-e-r, & Son, Inc., 190 Misc. 824, 825, New York  
21 Supreme, 1951, reversed on other grounds, 279 A.D. 470, First  
22 Department, 1952.

23 In both of those cases, the Courts recognized where  
24 an unanticipated event occurred that could be shown to have  
25 precluded performance. The doctrine would apply to a tenant.

1 In the first case, a store was leased to a tenant of Japanese  
2 origin, and after Pearl Harbor, the alien property custodian  
3 seized the contents of the store and the tenant was forced to  
4 vacate the premises. The Court denied a motion for summary  
5 judgment, stating that it needed more facts to determine  
6 whether performance was, in fact, precluded, but it clearly  
7 recognized the doctrine.

8 Similarly, in the Gardiner Properties case, the  
9 tenant was precluded by governmental action from building a  
10 theater in the leased premises and argued the impossibility or  
11 frustration doctrine. Since there was a 90-year lease, the  
12 Court ultimately, and this is how it was reversed, determined  
13 that since there was 90 years left, at some point frustration  
14 would not occur. The Appellate Division reversed saying you  
15 needed a trial on that point, but the lower court recognized  
16 that for the period when the property could not be used as  
17 specifically contemplated by the parties, the tenant would owe  
18 rent. See Restatement (Settling) of Property: Landlord &  
19 Tenant, § 9.3.

20 So it would appear to me there's a very good argument  
21 here that the very purpose of the lease, i.e. to occupy the  
22 premises and manufacture the good there, was made impossible or  
23 frustrated by the Governor's stay in place orders, and  
24 therefore that the doctrine of impossibility or frustration  
25 would apply, at least for the duration of those orders.

1           No one raised that issue except me, so I believe that  
2 the issue should be briefed, and frankly, there may need to be  
3 some sort of evidentiary hearing on it. But in the meantime,  
4 given that issue and the Debtor's financial position, it  
5 appears to me that the motion should be denied at this time,  
6 albeit as I noted earlier to still require the Debtor to pay  
7 adequate protection in the form of maintaining the insurance,  
8 paying the taxes when shown to be due, and otherwise  
9 maintaining the property. But that requirement does not go  
10 further to require ongoing payment of rent.

11           As noted in the Wedtech case, and as is clear here,  
12 lifting the stay based on nonpayment of rent would be a futile  
13 effort given that Citibank has a lien on the assets, including  
14 the cash, and the only way ultimately for the landlord to get  
15 paid on an ongoing basis is for the Debtor to be sold as a  
16 going concern or to generate sufficient revenues to resume  
17 payments in full.

18           So that's my preliminary ruling. I don't know if  
19 anyone has anything further to say on it. Otherwise, it'll  
20 become my actual ruling.

21           MR. YAN: Your Honor, if I may --

22           THE COURT: Go ahead.

23           MR. YAN: Yeah. We heard, Your Honor, the points  
24 regarding the frustration or impossibility to perform; however,  
25 I believe the (inaudible) is trumped by federal -- the Congress

1 up to this point has not helped any (inaudible) not be paid  
2 during their shutdown under Governor Cuomo's order to  
3 (inaudible) to go home.

4 THE COURT: Well, except, sir, the statute actually  
5 says, again, that the Trustee shall timely perform all  
6 obligations of the Debtor under any unexpired lease for  
7 nonresidential real property. The doctrine of impossibility or  
8 frustration is an implied term in the lease. When you take a  
9 look at the primary case that I've cited, the Taiyo case,  
10 you'll see that rationale for the doctrine. So Congress didn't  
11 create a new contract, it simply requires timely performance  
12 under the contract, and if applicable contract law relieves the  
13 party of the obligation to pay under the contract, then  
14 Congress doesn't require payment.

15 MR. YAN: And I believe (inaudible) very huge  
16 implication on the other real property on a commercial lease,  
17 and I don't believe that's in the order that commercial tenants  
18 can do to the order of the governor (inaudible) can avoid  
19 payment of this kind of rent for the duration that --

20 THE COURT: You could brief that issue. Thus far,  
21 there's one case that we could find dealing with a COVID  
22 obligation or an excuse of impossibility based on COVID, and  
23 while recognizing the general principal, it didn't apply it on  
24 those facts because there were individual defendants alleging  
25 the doctrine of impossibility, and they had made no showings

1 that their own assets prevented them, or they were unable to  
2 pay, based on their own assets. It wasn't a landlord/tenant  
3 case. Lantino v. Clay, LLC, 2020 WL 2239957 SDNY, May 8, 2020.

4 So I appreciate this will shake out and have major  
5 consequences in New York and elsewhere over time. Your client  
6 may end up making the same arguments to its lender, for  
7 example, that the doctrine of impossibility precludes your  
8 client's tenant from paying it rent, and it has no other ways  
9 to pay its lender, maybe it has an excuse too. But for now,  
10 based on the two reasons that I stated, I don't see any  
11 requirement to actually pay the amounts outstanding at this  
12 time, and again, I appreciate that I raised this issue myself,  
13 and for that reason, I would certainly authorize further  
14 briefing, but the point being it may be that the Debtor never  
15 owes that money, and that's what the parties should be  
16 briefing.

17 I don't view that as something that needs to be done  
18 on an expedited basis because the Debtor's own cash flow issues  
19 still preclude payment going forward anyway, which under the  
20 Wedtech, Pier 1, and other cases would relieve it of the need  
21 to make the payments.

22 MR. YAN: Your Honor, for this issue, I believe that  
23 we have the right of bank counsel to come in to provide  
24 amicable brief and probably this would have huge implications.  
25 Maybe we should look at the other party to come in.

1 THE COURT: I don't think so. I mean, I don't think  
2 your client's bank would be a party and interest in this case  
3 on this issue. I'm not ruling on impossibility as to your  
4 contract with your bank.

5 MR. YAN: Because that their landlord, it's not  
6 (inaudible) to make the monthly --

7 THE COURT: It's a separate set of facts, as I noted,  
8 the cases that I cited are all in the context of denying  
9 motions on the pleadings or for summary judgment. They needed  
10 more facts. It's a fact-based determination as the cases in  
11 the restatement that I cited make clear, so I'm not going to  
12 start determining all up through the chain of contracts. I'm  
13 just focusing on the lease between this Debtor and your client.

14 MR. YAN: And, Your Honor, also that's the shelter in  
15 place order by Governor Cuomo did not start until March 20.  
16 Probably we need more time, about 30 or 45 days, to submit the  
17 brief.

18 THE COURT: That's fine. Again, I leave it up to the  
19 parties. I don't view this as something that needs to be done  
20 on an expedited basis. You may well want to discuss with the  
21 Debtor through Mr. Bronson the sale process that is in place  
22 because, frankly, that is probably the best opportunity for  
23 your client to get paid in any event rather than incurring  
24 extra costs now.

25 MR. YAN: I --



1 THE COURT: Let me finish, sir. And I think that it  
2 probably would need to be briefed in the context of a motion to  
3 assume the lease because obviously there's the cure issue, so  
4 that's the outside date as far as the briefing on this point is  
5 concerned. So I recommend that you speak with Mr. Bronson  
6 about the timetable for the sale process before the two of you  
7 set a briefing schedule on whether there is any claim for the  
8 prepetition period, and if so, for what portion of the period,  
9 etc.

10 MR. YAN: Your Honor, one more question. On the  
11 issue about (inaudible) for October 2019 rent that the Debtor  
12 provided the rent check but it was returned for insufficient  
13 funds.

14 THE COURT: Right. That's a claim. You have a  
15 prepetition claim for those unpaid amounts.

16 MR. YAN: Right. Since it's not dischargeable, do we  
17 have to start under the motion, I mean adversary proceedings?

18 THE COURT: Read the Bankruptcy Code. Read 523.  
19 There are only limited instances where a non-individual has a  
20 debt that is non-dischargeable.

21 Okay. So, Mr. Bronson, I'll look for two orders from  
22 you, first the order providing for further interim use of cash  
23 collateral. I think with the budget, you just need to have an  
24 asterisk that says that of that \$114,000 budgeted, unless the  
25 Debtor's able to make the tax payment separately, that amount

1 will be used to pay the taxes.

2 MR. BRONSON: Yes, Your Honor.

3 THE COURT: And then secondly, an order denying the  
4 motion to compel immediate payment --

5 MR. BRONSON: Yes, Your Honor.

6 THE COURT: -- without prejudice to the party's  
7 rights as to the actual amount owed as an administrative  
8 expense that is not being paid.

9 You don't have to formally settle either of those  
10 orders, but you should provide a copy -- obviously you're going  
11 to be working through it with Citibank, but also provide a copy  
12 to Mr. Yan --

13 MR. BRONSON: Certainly.

14 THE COURT: -- you know, shortly before you email  
15 chambers so he can make sure it's consistent with my ruling.

16 MR. BRONSON: Certainly, Your Honor.

17 THE COURT: Okay. Anything else in this case?

18 MR. YAN: Yes. The last issue about the insurance,  
19 Your Honor. The Debtor has their own insurance; however, all  
20 insurance has to be approved by the lending institutions. If  
21 the Debtor in Possession has to use their own insurance, they  
22 have to provide a binder to us so that we can provide it to the  
23 lender for review and approval.

24 THE COURT: That's fine. I didn't understand that  
25 that had not been done. If it's not been done, Mr. Bronson,

1 you should send proof of insurance to Mr. Yan.

2 MR. BRONSON: Absolutely.

3 THE COURT: Okay.

4 MR. BRONSON: No problem with that.

5 THE COURT: That should be done promptly. I guess  
6 that would be the binder.

7 MR. BRONSON: Yes, Your Honor. No problem. We'll do  
8 that today.

9 THE COURT: Okay. Very well. All right. Anything  
10 else?

11 MR. BRONSON: I don't think so, Your Honor.

12 THE COURT: All right.

13 MR. BRONSON: We have a date of August 14<sup>th</sup> on the  
14 interim order, and I would queue up the fee applications for  
15 the two professionals so they could start getting some  
16 payments.

17 THE COURT: Okay. Has Miss Lee cleared that date?

18 MR. BRONSON: She's cleared that date for the interim  
19 order.

20 THE COURT: That's fine. You can put the other stuff  
21 on then too.

22 MR. BRONSON: Okay. Thank you, Your Honor.

23 THE COURT: Okay. All right. Very well.

24 (PROCEEDING CONCLUDED)

25

CERTIFICATION

I, Diane C. Genender, certify that the foregoing is  
a correct transcript from the sound recording in the above-  
entitled matter.

Dated: July 15, 2020

A rectangular box containing a handwritten signature in cursive script that reads "Diane C. Genender".

Signature of Approved Transcriber